

1 UNITED STATES DISTRICT COURT
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6 UNITED STATES OF AMERICA) 20CR6113
7
8 vs. Rochester, New York
9 JOSEPH MCGRAIN) April 20, 2021
10 Defendant. 3:00 P.M.
11 - - - - - X
12 PLEA HEARING
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ELIZABETH A. WOLFORD
UNITED STATES DISTRICT JUDGE

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3 P R O C E E D I N G S
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15:10:24 7 THE CLERK: We're here in the matter of the
15:10:25 8 United States versus Joseph McGrain, 20CR6113.

15:10:30 9 THE COURT: Good afternoon, everybody. We
15:10:40 10 have Ms. Marangola here from the U.S. Attorney's Office;
15:10:42 11 and Mr. Ciccone from the Federal Public Defender's
15:10:42 12 Office.

15:10:45 13 And are you Joseph McGrain?

15:10:47 14 THE DEFENDANT: Yes.

15:10:47 15 THE COURT: And you're represented by Mr.
15:10:50 16 Ciccone?

15:10:51 17 THE DEFENDANT: Yes.

15:10:51 18 THE COURT: And I understand that you intend
15:10:53 19 to plead guilty to the indictment in this case without
15:10:56 20 the benefit of a plea agreement, correct?

15:10:59 21 THE DEFENDANT: Yes, ma'am.

15:11:00 22 THE COURT: First of all, I want you to move
15:11:07 23 the microphone so that it is closer to you so I can hear
15:11:10 24 everything you are saying, especially with the mask
15:11:12 25 because sometimes it becomes muffled.

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15:11:16 2 I need to ask you questions. The purpose of
15:11:17 3 my questions is that I need to make sure that you
15:11:20 4 understand everything you're agreeing to and you're
15:11:22 5 entering into the plea in a knowing, voluntary and
15:11:24 6 intelligent manner. So if at any point in time during
15:11:28 7 the course of my questions you either do not understand
15:11:31 8 me or you have a question for me or Mr. Ciccone, I want
15:11:33 9 you to stop me and ask your question. Do you
15:11:37 10 understand?

15:11:37 11 THE DEFENDANT: Yes, ma'am.

15:11:37 12 THE COURT: The goal is not to go through
15:11:40 13 this quickly. The goal is to make sure you understand
15:11:43 14 your rights and the rights that you're going to be
15:11:45 15 giving up. Do you understand?

15:11:47 16 THE DEFENDANT: Yes, ma'am.

15:11:47 17 THE COURT: I'll ask you please stand and
15:11:50 18 raise your right hand.

15:11:50 19 THE CLERK: Do you solemnly swear to tell
15:11:50 20 the truth, the whole truth, and nothing but the truth so
15:11:50 21 help you God?

15:11:50 22 THE DEFENDANT: Yes.

15:12:05 23 THE COURT: Okay. You can put it down.
15:12:06 24 What you just did, sir, is you took an oath to tell me
15:12:09 25 the truth, therefore I'm going to expect you to answer

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15:12:12 2 my questions truthfully. If you do not answer my
15:12:14 3 questions truthfully, you could be prosecuted for
15:12:17 4 another crime called perjury. Do you understand that.

15:12:18 5 THE DEFENDANT: Yes, ma'am.

15:12:19 6 THE COURT: Could you state your full name
15:12:20 7 for the record?

15:12:21 8 THE DEFENDANT: Joseph McGrain.

15:12:22 9 THE COURT: Do you have a middle name?

15:12:23 10 THE DEFENDANT: No, ma'am.

15:12:24 11 THE COURT: Where were you born?

15:12:25 12 THE DEFENDANT: I was born in Rochester, New
15:12:27 13 York.

15:12:27 14 THE COURT: How old are you?

15:12:28 15 THE DEFENDANT: I'm 50 years old.

15:12:29 16 THE COURT: How far did you go in school?

15:12:31 17 THE DEFENDANT: Graduated.

15:12:33 18 THE COURT: Graduated from high school?

15:12:34 19 THE DEFENDANT: High school, ma'am.

15:12:35 20 THE COURT: Can you read, write and
15:12:37 21 understand English?

15:12:37 22 THE DEFENDANT: Yes.

15:12:38 23 THE COURT: Are you currently being treated
15:12:39 24 for any medical or mental health condition?

15:12:42 25 THE DEFENDANT: No, ma'am.

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15:12:42 2 THE COURT: Are you taking any prescription
15:12:44 3 medication?

15:12:45 4 THE DEFENDANT: No, ma'am.

15:12:49 5 THE COURT: You seemed to hesitate there.

15:12:51 6 THE DEFENDANT: I was thinking I'm taking
15:12:53 7 stuff for heartburn, that is not prescription, it is
15:12:56 8 over the counter.

15:12:57 9 THE COURT: And are you under the influence
15:12:58 10 of any drugs or alcohol?

15:12:59 11 THE DEFENDANT: No, ma'am.

15:12:59 12 THE COURT: Is there any reason that you are
15:13:01 13 not able to understand what is happening here in court
15:13:04 14 today?

15:13:05 15 THE DEFENDANT: No, ma'am.

15:13:05 16 THE COURT: Now, have you talked to Mr.
15:13:08 17 Ciccone about the government's case against you, and by
15:13:11 18 that I mean the proof that the government would have and
15:13:13 19 if this case went to trial as we're scheduled to do
15:13:16 20 right now on June 1st?

15:13:18 21 THE DEFENDANT: Yes.

15:13:18 22 THE COURT: Have you talked to him about
15:13:19 23 that?

15:13:20 24 THE DEFENDANT: Yes, ma'am.

15:13:20 25 THE COURT: Have you also talked with Mr.

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15:13:22 2 Ciccone about what the likely result might be if the
15:13:25 3 case went to trial?

15:13:26 4 THE DEFENDANT: Yes, ma'am.

15:13:26 5 THE COURT: Would it be fair to state that
15:13:29 6 based on your discussions with your attorney, you
15:13:31 7 believe pleading guilty to the indictment is in your
15:13:35 8 best interest?

15:13:35 9 THE DEFENDANT: Yes, ma'am.

15:13:37 10 THE COURT: Now, Mr. Ciccone, maybe you
15:13:39 11 could explain for us -- obviously, Mr. McGrain, more
15:13:43 12 often than not when defendants plead guilty, they do so
15:13:47 13 with the benefit of a plea agreement. So maybe, Mr.
15:13:50 14 Ciccone, you could explain for the record why you have
15:13:55 15 talked to your client about pleading guilty to the
15:13:57 16 indictment.

15:13:58 17 MR. CICCONE: Sure, Judge. You mean as in
15:14:00 18 why plead to the indictment instead of with a plea
15:14:03 19 agreement?

15:14:03 20 THE COURT: Yes, exactly.

15:14:04 21 MR. CICCONE: Judge, simply because the
15:14:06 22 indictment or, I'm sorry, the plea agreement is
15:14:09 23 essentially a plea to the indictment. The last plea
15:14:12 24 offer to Mr. McGrain was a plea to Count 1. Counts 2
15:14:16 25 and 3 are obstruction counts, which are included within

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15:14:19 2 the Guidelines anyway for Count 1, so there is really no
15:14:23 3 real advantage to having a plea agreement in this case.
15:14:26 4 But, obviously, a plea agreement requires waiver of
15:14:30 5 certain extra rights that Mr. McGrain does not have to
15:14:34 6 waive without the plea agreement.

15:14:35 7 THE COURT: So, in other words, your
15:14:36 8 assessment is that the plea offer did not really offer
15:14:40 9 any benefit to Mr. McGrain as opposed to simply pleading
15:14:44 10 to the indictment?

15:14:45 11 MR. CICCONE: Exactly, Judge.

15:14:46 12 THE COURT: And do you understand that, mr.
15:14:48 13 McGrain?

15:14:48 14 THE DEFENDANT: Yes, ma'am.

15:14:49 15 THE COURT: And you agree with that
15:14:50 16 assessment of your attorney?

15:14:52 17 THE DEFENDANT: Yes, ma'am.

15:14:53 18 THE COURT: Now, to the extent that you've
15:14:55 19 had any questions about any of this, has Mr. Ciccone
15:14:58 20 been able to answer them to your satisfaction?

15:15:00 21 THE DEFENDANT: Yes.

15:15:01 22 THE COURT: And have you had enough time to
15:15:03 23 talk to Mr. Ciccone about this before coming here today?

15:15:07 24 THE DEFENDANT: Honestly, no.

15:15:09 25 THE COURT: And so you feel you need more

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15:15:11 2 time?

15:15:12 3 THE DEFENDANT: It's not, it's because of
15:15:14 4 the COVID and Monroe County Jail.

15:15:16 5 THE COURT: And has that interfered with
15:15:20 6 your ability --

15:15:20 7 THE DEFENDANT: It's actually interfered
15:15:22 8 with a lot of us discussing stuff. There is just times,
15:15:26 9 certain times that we can discuss stuff and certain
15:15:30 10 times when I'm actually on a time limit, 15 minutes is
15:15:34 11 all I get, and if the 15 minutes is up, it's up. They
15:15:37 12 cut the phones off and you're out of the room and there
15:15:43 13 is nothing he can do and nothing I can do because of the
15:15:45 14 COVID and the situation we're in now.

15:15:47 15 THE COURT: Well, I'm not going to take a
15:15:49 16 plea from anybody that is telling me they haven't had
15:15:52 17 enough time to talk to their attorney about it.

15:16:00 18 THE DEFENDANT: We've had time to talk about
15:16:02 19 this, yes. Just the case overall, we haven't had enough
15:16:05 20 time to talk about at all.

15:16:06 21 THE COURT: I'm still not going to take a
15:16:09 22 plea from somebody telling me that. What we can do and
15:16:13 23 I'll ask the Marshals to hopefully try and accommodate
15:16:16 24 this is to arrange, if you don't have time to meet with
15:16:21 25 Mr. Ciccone at the jail, to have time to meet with him

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15:16:25 2 here in the holding cell to discuss anything that you
15:16:28 3 need to.

15:16:30 4 THE DEFENDANT: We've discussed all of this
15:16:32 5 earlier before coming in, and I agree with everything
15:16:34 6 we've discussed here. Like I said, the overall, from
15:16:37 7 the time that I was incarcerated all the way up until
15:16:41 8 now, I haven't really had time to really talk to
15:16:44 9 anybody, not just him, anybody.

15:16:47 10 MR. CICCONE: Judge, I don't want to put
15:16:49 11 words in Mr. McGrain's moth, because we've had this
15:16:52 12 conversation multiple times. He thinks the case took
15:16:57 13 longer than if we would have had time to talk for longer
15:17:01 14 periods of time, not necessarily there is more he wants
15:17:04 15 to talk about once we've gotten here.

15:17:07 16 THE COURT: Is that true?

15:17:08 17 THE DEFENDANT: That is what I'm trying to
15:17:09 18 get to.

15:17:09 19 THE COURT: Are you telling me that you need
15:17:11 20 to talk about the evidence more with Mr. Ciccone or that
15:17:14 21 you need to discuss --

15:17:16 22 THE DEFENDANT: No.

15:17:16 23 THE COURT: -- the potential result here
15:17:19 24 more with Mr. Ciccone before you move forward?

15:17:21 25 THE DEFENDANT: No.

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15:17:22 2 THE COURT: Do you want to move forward?

15:17:23 3 THE DEFENDANT: I want to move forward. I

15:17:24 4 want to put this behind me and my family.

15:17:28 5 THE COURT: You're looking at an awful lot
15:17:31 6 of time. It's a mandatory minimum of 10 years, I think,
15:17:33 7 for Count 1.

15:17:34 8 THE DEFENDANT: I have to look at life if I
15:17:36 9 go to trial, so take your pick.

15:17:39 10 THE COURT: Well, and that is because you
15:17:41 11 believe you'll likely be convicted at trial, correct?

15:17:46 12 THE DEFENDANT: Yes.

15:17:46 13 THE COURT: Look it, I want you to be able
15:17:50 14 to -- this is a big decision you have to make here. And
15:17:53 15 I'm not suggesting by any means that the decision you're
15:17:56 16 making is the wrong one. But my role is to make sure
15:18:02 17 that anybody who appears in front of me and enters into
15:18:05 18 a plea and pleads guilty to something, gives up their
15:18:10 19 right to go to a trial, a constitutional right to go to
15:18:14 20 a trial, my job is to make sure that they know what
15:18:18 21 they're doing, and that they've had sufficient time to
15:18:20 22 talk through the issues with their attorney.

15:18:23 23 THE DEFENDANT: I know what I'm doing.

15:18:24 24 THE COURT: You sure?

15:18:25 25 THE DEFENDANT: Positive.

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15:18:26 2 THE COURT: And you want to go forward with
15:18:28 3 this today?

15:18:28 4 THE DEFENDANT: Yes.

15:18:29 5 THE COURT: Mr. Ciccone, are you confident
15:18:32 6 that Mr. McGrain has had enough time to talk to you
15:18:35 7 about this?

15:18:36 8 MR. CICCONE: Judge, I am in the sense of
15:18:38 9 what I mentioned before. Overall, we've talked many,
15:18:40 10 many times, albeit in 15-minute increments and sometimes
15:18:45 11 here at the courthouse when we've had appearances. I
15:18:48 12 don't have any doubt that we've spoken at length about
15:18:51 13 the evidence in the case, the likelihood of or different
15:18:56 14 strategies of what we might do as we prepared for trial,
15:19:00 15 as we prepared for motions. And based on my previous
15:19:06 16 conversations with Mr. McGrain, I didn't get the
15:19:08 17 impression that that is what he meant. I think we've
15:19:12 18 certainly talked about the case as much as I've talked
15:19:16 19 to any client about any case. But it has been under
15:19:21 20 less than ideal circumstances for sure. And, you know,
15:19:24 21 when I meet with him at the jail, we have to talk
15:19:26 22 through the phone through the glass or on the phone from
15:19:29 23 the jail to my office, and it certainly hasn't been
15:19:32 24 ideal. But I don't think there is any part of his case
15:19:35 25 that we haven't discussed. But I'm happy to talk with

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15:19:39 2 him further to make sure.

15:19:41 3 THE COURT: Because what I can tell you Mr.
15:19:44 4 McGrain, I have a calendar on Monday next week. I can
15:19:47 5 put this down for a plea hearing on Monday if you think
15:19:50 6 that would make more sense for you to talk to Mr.
15:19:54 7 Ciccone and make sure that any issues that you need to
15:19:56 8 address have been resolved? If you tell me you don't
15:20:00 9 want to do that, that you're satisfied that you've had
15:20:02 10 enough time to talk to him.

15:20:04 11 THE DEFENDANT: I've had enough time to talk
15:20:06 12 with him.

15:20:07 13 THE COURT: You're sure about that?

15:20:08 14 THE DEFENDANT: I'm satisfied.

15:20:09 15 THE COURT: All right. Are you satisfied
15:20:10 16 with his advice and representation?

15:20:12 17 THE DEFENDANT: Yes.

15:20:12 18 THE COURT: All right. Any concerns, Ms.
15:20:15 19 Marangola, about going forward with this?

15:20:16 20 MS. MARANGOLA: No, your Honor.

15:20:17 21 THE COURT: And, Mr. Ciccone, you have no
15:20:19 22 concerns?

15:20:19 23 MR. CICCONE: No, Judge.

15:20:20 24 THE COURT: All right. Let me direct your
15:20:23 25 attention to a document that the government filed, which

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15:20:28 2 is the government's calculations of maximum sentence and
15:20:32 3 sentencing Guideline range. Let me maybe back up a
15:20:36 4 minute. In Federal Court, when a defendant gets
15:20:40 5 sentenced, the judge first has to calculate what the
15:20:43 6 Sentencing Guidelines would recommend for a sentence.
15:20:46 7 That is a decision that I will make at the time of
15:20:49 8 sentencing. I'll make that decision based in part on
15:20:52 9 what I see in a Presentence Investigation Report that
15:20:55 10 will be prepared by the Probation Department. In that
15:20:59 11 report, the Probation Department will calculate an
15:21:02 12 offense level and a criminal history category, and then
15:21:05 13 those numbers will recommend a range for a sentence. Do
15:21:08 14 you understand that?

THE DEFENDANT: Yes, ma'am.

15:21:11 16 THE COURT: Now, the Sentencing Guidelines
15:21:13 17 are considered advisory, they are not mandatory. I also
15:21:18 18 have to consider a number of other factors in connection
15:21:20 19 with sentencing. I have to consider your background,
15:21:23 20 the nature and circumstances of the crime that you pled
15:21:25 21 guilty to. I have to consider various other factors,
15:21:31 22 among other things, too, I have to look at what the
15:21:34 23 mandatory minimum and maximum sentences that can be
15:21:37 24 imposed. Do you understand that?

THE DEFENDANT: Yes.

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15:21:39 2 THE COURT: Now here the government has
15:21:40 3 indicated that for Count 1, which is the charge of
15:21:46 4 enticement of a minor in violation of Title 18 U.S.C.
15:21:52 5 Section 2422(b), that there is a mandatory minimum
15:21:56 6 prison sentence of 10 years, a maximum possible prison
15:22:00 7 sentence of life, a fine of \$250,000, a mandatory \$100
15:22:08 8 special assessment, and a supervised release term of at
15:22:11 9 least five years and up to life. Those are the
15:22:13 10 parameters of what the lowest and the highest that I can
15:22:17 11 impose for the conviction on Count 1. Do you understand
15:22:19 12 that?

15:22:20 13 THE DEFENDANT: Yes, ma'am.

15:22:20 14 THE COURT: Now, for Count 2, that is the
15:22:25 15 attempted obstruction of justice charge, the maximum
15:22:28 16 possible prison sentence is 20 years, a fine of
15:22:33 17 \$250,000, there is another mandatory \$100 special
15:22:36 18 assessment, and then the supervised release term is up
15:22:38 19 to three years. Do you understand that?

15:22:39 20 THE DEFENDANT: Yes, ma'am.

15:22:41 21 THE COURT: And then for Count 3, an
15:22:45 22 obstruction of justice charge, the maximum possible
15:22:48 23 prison sentence is 20 years, a fine of \$250,000, there
15:22:53 24 is a mandatory \$100 special assessment, and then the
15:22:56 25 supervised release term is up to three years. Do you

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15:22:58 2 understand that?

15:22:59 3 THE DEFENDANT: Yes, ma'am.

15:23:01 4 THE COURT: Now, those \$100 special
15:23:03 5 assessments, they may not seem like a big deal in the
15:23:06 6 scheme of things, they are mandatory. I have to impose
15:23:09 7 them as part of sentencing. Do you understand that?

15:23:11 8 THE DEFENDANT: Yes.

15:23:11 9 THE COURT: In addition, supervised release.
15:23:15 10 Have you talked to Mr. Ciccone about supervised release?

15:23:18 11 THE DEFENDANT: Yes.

15:23:18 12 THE COURT: It's a type of -- that is what
15:23:20 13 they call it in Federal Court, it's a type of probation
15:23:24 14 or parole. And after any prison sentence, you'll be
15:23:26 15 placed on supervised release for a certain number of
15:23:29 16 years up to the maximum of life that is allowed for
15:23:32 17 Count 1. And while on supervised release, you'll need
15:23:34 18 to comply with certain terms and conditions that I set
15:23:37 19 and that the probation office sets with my approval. Do
15:23:40 20 you understand that?

15:23:40 21 THE DEFENDANT: Yes, ma'am.

15:23:42 22 THE COURT: Now, if while on supervised
15:23:44 23 release it's proven by a preponderance of evidence that
15:23:47 24 you violated those terms and conditions, then you could
15:23:50 25 go back to prison without getting any credit for the

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15:23:53 2 time that you've already served on supervised release.

15:23:55 3 Do you understand that?

15:23:55 4 THE DEFENDANT: Yes, ma'am.

15:24:06 5 THE COURT: Now, let's take a look at the
15:24:09 6 Guideline calculations that the government has at least
15:24:12 7 calculated. If you look at paragraph 7 of the
15:24:15 8 government's filing at docket 71. The government, in
15:24:21 9 this document, Mr. McGrain, is setting forth what it
15:24:25 10 believes the Guideline calculation will provide. This
15:24:28 11 doesn't bind me, it doesn't bind you. Ultimately I need
15:24:31 12 to make my own determination about that, and I'll do
15:24:34 13 that at the time of sentencing. But this, at least,
15:24:37 14 let's us know what the government's present position is
15:24:40 15 in terms of what the Guidelines provide.

15:24:43 16 THE DEFENDANT: Yes, ma'am.

15:24:44 17 THE COURT: And the government may change
15:24:45 18 its position up to the time of sentencing because,
15:24:48 19 again, there is no plea agreement here. They are
15:24:51 20 setting forth what they believe are the correct
15:24:53 21 calculations. So for Count 1, they believe there is a
15:24:56 22 base offense level of 28. They believe then in
15:24:59 23 paragraph 8 that there should be a two-level increase
15:25:02 24 because the use of a computer or an interactive computer
15:25:05 25 service was used to persuade, induce, entice, coerce or

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15:25:12 2 facilitate the travel of the minor. And then a
15:25:14 3 two-level increase because of the commission of a sex
15:25:17 4 act. And then the government also believes there should
15:25:21 5 be another two-level increase because of the obstruction
15:25:23 6 of justice. And then the government believes, as set
15:25:26 7 forth in paragraph 10, that there should be a five-level
15:25:29 8 increase because the underlying offense is a chapter 117
15:25:35 9 crime, so that your adjusted offense level for Count 1
15:25:39 10 would be a 39. Do you understand that is the
15:25:41 11 government's position?

15:25:43 12 THE DEFENDANT: Yes, ma'am.

15:25:43 13 THE COURT: And then counts 2 and 3, which
15:25:46 14 are the obstruction of justice charges, are grouped
15:25:49 15 together. Government believes that they provide a base
15:25:52 16 offense level of 14. So, under the Guidelines, if these
15:25:56 17 numbers are correct, you would rely on the offense level
15:25:59 18 calculated for Count 1, which is a 39. Do you
15:26:03 19 understand that?

15:26:03 20 THE DEFENDANT: Yes, ma'am.

15:26:05 21 THE COURT: Now, if in fact I determine at
15:26:09 22 the time of sentencing that you truly are remorseful for
15:26:13 23 your conduct and that you have accepted responsibility,
15:26:17 24 then the Guidelines would provide that there should be a
15:26:20 25 three-level increase in the offense level, which,

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15:26:23 2 according to the government's calculations, would take
15:26:25 3 your offense level down to a 36. Do you understand
15:26:28 4 that?

15:26:28 5 THE DEFENDANT: Yes, ma'am.

15:26:30 6 THE COURT: Now, you don't get acceptance of
15:26:32 7 responsibility automatically by coming in here and
15:26:35 8 pleading guilty. Remember I said that you're going to
15:26:37 9 be interviewed by the probation department and they are
15:26:39 10 going to prepare a Presentence Investigation Report?

15:26:42 11 THE DEFENDANT: Yes, ma'am.

15:26:43 12 THE COURT: Well, I have to be satisfied,
15:26:45 13 Mr. McGrain, at the time of sentencing, based in part on
15:26:48 14 what I see in the report, that you truly are remorseful
15:26:51 15 for your conduct and that you have accepted
15:26:53 16 responsibility. Do you understand that?

15:26:54 17 THE DEFENDANT: Yes, ma'am.

15:26:54 18 THE COURT: If you were to commit another
15:26:56 19 crime between now and the time of sentencing, that could
15:26:59 20 lead me to conclude that you have not accepted
15:27:02 21 responsibility. Do you understand that?

15:27:03 22 THE DEFENDANT: Yes, ma'am.

15:27:05 23 THE COURT: And then the government believes
15:27:07 24 that you are a criminal history category I, which is the
15:27:10 25 lowest level that you can have. Do you understand that?

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15:27:12 2 THE DEFENDANT: Yes, ma'am.

15:27:13 3 THE COURT: So if these numbers are correct
15:27:16 4 and you have an offense level of 36, and a criminal
15:27:19 5 history category of I, as set forth in paragraph 18 of
15:27:24 6 the government's filing, the Guidelines would recommend
15:27:26 7 a prison sentence of 188 to 235 months, a fine of
15:27:35 8 \$40,000 up to \$250,000, and a supervised release term of
15:27:39 9 five years up to life. Do you understand that?

15:27:40 10 THE DEFENDANT: Yes, ma'am.

15:27:41 11 THE COURT: Now, I want to make sure you're
15:27:43 12 clear on a couple of things, Mr. McGrain. First of all,
15:27:46 13 once you plead guilty, you cannot take your plea back.
15:27:49 14 And the reality is I could sentence you up to the
15:27:52 15 maximum allowed under the law, which includes life in
15:27:55 16 prison. Do you understand that?

15:27:56 17 THE DEFENDANT: Yes, ma'am.

15:27:57 18 THE COURT: And in addition, as I've said,
15:27:59 19 these are the government's Guideline calculations or
15:28:02 20 what the government believes are the Guideline
15:28:03 21 calculations right now. I'm going to make my own
15:28:07 22 determination about that. And I'll do that at the time
15:28:09 23 of sentencing. Do you understand that?

15:28:10 24 THE DEFENDANT: Yes.

15:28:11 25 THE COURT: But, ultimately, the Guidelines

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15:28:13 2 are just recommendations. They are not mandatory. What
15:28:16 3 is mandatory here is that I impose this mandatory
15:28:20 4 minimum prison sentence of 10 years for the conviction
15:28:24 5 on Count 1. Do you understand that?

15:28:26 6 THE DEFENDANT: Yes, ma'am.

15:28:27 7 THE COURT: Do you have any questions for me
15:28:29 8 or Mr. Ciccone about anything that we've talked about up
15:28:32 9 to this point?

15:28:34 10 THE DEFENDANT: No, ma'am.

15:28:38 11 THE COURT: Let me talk to you about the
15:28:40 12 forfeiture allegations in the indictment, too. Again,
15:28:43 13 it may not seem like a big deal in the scheme of things,
15:28:47 14 but the indictment has a forfeiture allegation where it
15:28:50 15 seeks to forfeit the cell phone, that is the Samsung
15:28:57 16 Galaxy cell phone. Do you understand that?

15:28:57 17 THE DEFENDANT: Yes.

15:28:58 18 THE COURT: Now, normally before the
15:29:00 19 government can take property that belongs to an
15:29:02 20 individual, that individual has the right to certain
15:29:06 21 notice, you actually could go to a jury trial on that
15:29:09 22 issue. But one of the questions that I'll be asking you
15:29:12 23 is whether you admit to the forfeiture allegation that
15:29:16 24 is part of this indictment. Do you understand that?

15:29:17 25 THE DEFENDANT: Yes, ma'am.

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15:29:19 2 THE COURT: Let me talk to you now, Mr.
15:29:21 3 McGrain, about the rights that you're going to be giving
15:29:23 4 up by pleading guilty as opposed to going to trial.
15:29:26 5 First of all, do you understand that you do not need to
15:29:29 6 plead guilty to anything. If you wanted, you could go
15:29:32 7 forward with a jury trial that we have scheduled to
15:29:36 8 start on June 1. Do you understand that?

15:29:37 9 THE DEFENDANT: Yes, ma'am.

15:29:38 10 THE COURT: And at that trial, as well as at
15:29:40 11 all critical stages of this proceeding, you'd have the
15:29:43 12 right to continued representation by counsel. Do you
15:29:46 13 understand that?

15:29:46 14 THE DEFENDANT: Yes, ma'am.

15:29:48 15 THE COURT: You would not have the burden to
15:29:50 16 prove anything at this trial. The sole burden of proof
15:29:53 17 at this trial would be on the government who would be
15:29:57 18 responsible for calling witnesses and putting evidence
15:29:59 19 into the record. Do you understand that?

15:30:00 20 THE DEFENDANT: Yes, ma'am.

15:30:01 21 THE COURT: Your attorney on your behalf
15:30:03 22 could challenge any of the evidence that the government
15:30:05 23 sought to introduce and he could confront and cross
15:30:10 24 examine any of the witnesses who testified. Do you
15:30:11 25 understand that?

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15:30:11 2 THE DEFENDANT: Yes, ma'am.

15:30:13 3 THE COURT: You'd have the right, if you
15:30:14 4 wanted to, to testify on your own behalf or you could
15:30:19 5 choose not to do that. Do you understand that?

15:30:21 6 THE DEFENDANT: Yes, ma'am.

15:30:21 7 THE COURT: You also would have the right to
15:30:23 8 put in a defense case. You could call witnesses, compel
15:30:27 9 them to attend the trial, put in your own evidentiary
15:30:30 10 proof or you could chose not to do that. Do you
15:30:32 11 understand that?

15:30:32 12 THE DEFENDANT: Yes, ma'am.

15:30:33 13 THE COURT: And if you chose not to testify
15:30:34 14 or if you chose not to put in any type of a defense
15:30:37 15 case, I would specifically instruct the jury that they
15:30:40 16 could not in any way consider that as evidence of your
15:30:43 17 guilty or evidence of anything else for that matter. Do
15:30:46 18 you understand that?

15:30:46 19 THE DEFENDANT: Yes, ma'am.

15:30:48 20 THE COURT: In addition, the jury would have
15:30:50 21 to consider each charge against you separately and find
15:30:54 22 that the government had proven each element of the
15:30:56 23 charge under consideration beyond a reasonable doubt.
15:30:59 24 Do you understand that?

15:31:00 25 THE DEFENDANT: Yes, ma'am.

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15:31:02 2 THE COURT: And why don't you, if you would,
15:31:04 3 turn to paragraph five of the government's statement. I
15:31:07 4 guess, first of all, Mr. Ciccone, do you disagree with
15:31:10 5 the elements that are set forth here by the government?

15:31:13 6 MR. CICCONE: No, your Honor.

15:31:14 7 THE COURT: Okay. So let's go through each
15:31:17 8 of the counts and each of the elements, Mr. McGrain,
15:31:21 9 that the government would have to prove at trial. So
15:31:23 10 for Count 1, before you could be convicted, the
15:31:28 11 government would have to prove beyond a reasonable doubt
15:31:31 12 that you knowingly used or attempted to use a facility
15:31:34 13 or means of interstate commerce to persuade, induce,
15:31:38 14 entice or coerce an individual under the age of 18 to
15:31:42 15 engage in sexual activity. No. 2, you believed that
15:31:47 16 such individual was less than 18 years of age. And
15:31:50 17 three, you could have been charged with a criminal
15:31:53 18 offense for engaging in the sexual activity. Do you
15:31:58 19 understand those are the elements that the government
15:31:59 20 would have to prove beyond a reasonable doubt before you
15:32:01 21 could be convicted of Count 1?

15:32:03 22 THE DEFENDANT: Yes, ma'am.

15:32:04 23 THE COURT: And then for Count 2, the
15:32:06 24 government would have to prove, beyond a reasonable
15:32:09 25 doubt, No. 1, that you knowingly used intimidation,

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2 threatened or corruptly persuaded a witness or attempted
3 to do so; and two, that you acted knowingly and with the
4 intent to influence the testimony of the witness in an
5 official federal proceeding. Do you understand those
6 are the elements that the government would have to prove
7 beyond a reasonable doubt before you could be convicted
8 of Count 2?

9 THE DEFENDANT: Yes, ma'am.

THE COURT: And then for Count 3, the
government would have to prove, No. 1, that you altered
or falsified or destroyed or concealed any record,
document or object that can be used to record or
preserve information; number two, that you acted
knowingly; and three, that you acted with the intent to
impede, obstruct or influence an investigation within
the jurisdiction of or in relation to a department or
agency of the United States Government. Do you
understand those are the elements that the government
would have to prove beyond a reasonable doubt before you
could be convicted of Count 3?

THE DEFENDANT: Yes, ma'am.

23 THE COURT: In addition, the jury would have
24 to be unanimous in its verdict. In other words, all 12
25 people would have to be in agreement that the government

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15:33:22 2 met its burden of proof. Do you understand that?

15:33:24 3 THE DEFENDANT: Yes, ma'am.

15:33:25 4 THE COURT: Do you understand that you're
15:33:26 5 going to be giving up these rights?

15:33:28 6 THE DEFENDANT: Yes, ma'am.

15:33:29 7 THE COURT: And do you understand that a
15:33:30 8 plea of guilty is the same as if a jury found you guilty
15:33:33 9 after trial?

15:33:34 10 THE DEFENDANT: Yes, ma'am.

15:33:35 11 THE COURT: Now, with a felony conviction,
15:33:37 12 you may lose certain civil rights, such as the right to
15:33:41 13 vote, the right to hold certain licenses or offices, the
15:33:44 14 right to sit on a jury. Do you understand that?

15:33:46 15 THE DEFENDANT: Yes, ma'am.

15:33:49 16 THE COURT: Has anyone coerced you or
15:33:51 17 threatened you in any way to get you to plead guilty?

15:33:54 18 THE DEFENDANT: No, ma'am.

15:33:55 19 THE COURT: Are you pleading guilty because
15:33:57 20 based on your discussions with your attorney, you
15:33:59 21 believe it's in your best interest to do so?

15:34:01 22 THE DEFENDANT: Yes.

15:34:02 23 THE COURT: Are you pleading guilty because
15:34:03 24 you are guilty?

15:34:04 25 THE DEFENDANT: Yes.

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15:34:05 2 THE COURT: Have you answered my questions
15:34:07 3 truthfully?

15:34:07 4 THE DEFENDANT: Yes, ma'am.

15:34:08 5 THE COURT: Do you have any question for me
15:34:09 6 or Mr. Ciccone?

15:34:10 7 THE DEFENDANT: No, ma'am.

15:34:12 8 THE COURT: All right. I do find, based on
15:34:15 9 Mr. McGrain's answers to my questions, that he is
15:34:18 10 entering into this plea in a knowing, voluntary and
15:34:20 11 intelligent manner. Now, before I can accept your pleas
15:34:24 12 though, Mr. McGrain, you're going to have to tell me
15:34:27 13 what you did. I need to make sure there is a factual
15:34:29 14 basis for your plea. So let's go through each count
15:34:35 15 separately.

15:34:35 16 And specifically for enticement of a minor,
15:34:40 17 can you tell me what you did that is causing you to
15:34:43 18 plead guilty?

15:34:43 19 THE DEFENDANT: I text messaged my
15:34:47 20 girlfriend's daughter. I was going through a divorce at
15:34:52 21 the time. Me and her ended up becoming close and I
15:34:56 22 started to have feelings for her. And so we were
15:34:59 23 texting messages back and forth. And I, we were texting
15:35:02 24 on how much we cared about each other. And I sent her
15:35:08 25 numerous texts saying how much I loved her.

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15:35:11 2 THE COURT: How old -- by "her" you're
15:35:14 3 referring to the daughter?

15:35:15 4 THE DEFENDANT: Yes.

15:35:16 5 THE COURT: And how old was she?

15:35:17 6 THE DEFENDANT: At the time it all started,
15:35:19 7 she was 15; she just turned 15.

15:35:22 8 THE COURT: And you knew she was less than
15:35:23 9 18 years of age?

15:35:24 10 THE DEFENDANT: Yes, ma'am.

15:35:25 11 THE COURT: And did you have sexual
15:35:27 12 relations with her?

15:35:28 13 THE DEFENDANT: No, ma'am.

15:35:30 14 THE COURT: You did not?

15:35:31 15 THE DEFENDANT: Ma'am, I didn't have sex
15:35:33 16 with her, no. I can't sit here and tell you I did
15:35:36 17 because I didn't. We were waiting until she was 18.

15:35:47 18 MS. MARANGOLA: It's not an element of the
15:35:49 19 crime that is necessary, but, in terms of -- I will --
15:35:53 20 that will be a sentencing enhancement that I will submit
15:35:58 21 that I'll prove to you at sentencing that that happened,
15:36:00 22 yes. But, in terms of the communications, to plead
15:36:05 23 guilty to enticement of a minor, it has to go beyond
15:36:10 24 love. He has to be admitting to the chats. I didn't
15:36:13 25 bring them down, I have them upstairs, if that is

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15:36:16 2 required, where he talks about wanting to feel her naked
15:36:20 3 body, have sex with her, sexual communications, Judge,
15:36:24 4 which would be sufficient. He is enticing her to engage
15:36:28 5 in that sexual activity. And we're alleging that would
15:36:31 6 be any sexual conduct with someone under the age of 18.
15:36:36 7 He has to admit more than him saying "I love you" or "I
15:36:40 8 loved you."

15:36:41 9 THE COURT: So the first element of Count 1
15:36:43 10 is that you have to admit that you knowingly used or
15:36:47 11 attempted to use a facility or means of interstate
15:36:50 12 commerce.

15:36:52 13 THE DEFENDANT: Yes. I sent text messages
15:36:54 14 saying that I wanted to have sex with her. I couldn't
15:36:57 15 wait until she was actually old enough to have sex with
15:37:01 16 one another.

15:37:01 17 THE COURT: Well, did you knowingly try to
15:37:05 18 persuade, induce, entice or coerce her to engage in
15:37:08 19 sexual activity.

15:37:10 20 THE DEFENDANT: No. Even in the messages
15:37:12 21 that they sent, that is exactly what I said. "I can't
15:37:15 22 wait to feel your naked body against mine." I didn't
15:37:19 23 coerce her. That is what I said, word for word. And I
15:37:24 24 even said and there is even in after the messages where
15:37:27 25 I even told her that I will wait until she is 18 because

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15:37:33 2 15 years in prison is not worth having sex with her. I
15:37:36 3 was willing to wait. Because, like I said, I loved this
15:37:40 4 girl. It wasn't lust, it wasn't just for sex. I was
15:37:46 5 going through a messy divorce with my wife, this girl
15:37:49 6 was there. She was there to comfort me and she was
15:37:52 7 there to talk to. And she made me feel good. She made
15:37:57 8 me feel young. So we were doing what the young people
15:38:00 9 do, sending text messages back and forth to one another.
15:38:05 10 And that is what I told her, "I can't wait to hold your
15:38:08 11 naked body against mine. I can't wait until we can have
15:38:12 12 sex." Because that is what we were doing, we were
15:38:17 13 waiting. Why she is telling everyone we had sex, I
15:38:21 14 don't know. The only thing I can conclude is because I
15:38:23 15 came to my senses and figured she is still a child and I
15:38:27 16 didn't want to ruin her life. I wanted to move on and
15:38:31 17 get out of the house as quickly as I could. The moment
15:38:34 18 I did that, that is when everything blew up. But I'm
15:38:39 19 not going to sit here and lie and say I had sex with
15:38:44 20 this girl when I did not. I clearly did not. I
15:38:47 21 wouldn't do that.

15:38:50 22 If that means this is all thrown away, then
15:38:53 23 I'm going to have to throw it away. I'm not going to
15:38:57 24 admit to having sex with her, I didn't.

15:39:00 25 THE COURT: You're not admitting to

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15:39:03 2 attempting to persuade, induce, coerce or entice her.

15:39:06 3 THE DEFENDANT: No. All I did is -- read

15:39:09 4 the text messages.

15:39:12 5 THE COURT: I think the jury will read the

15:39:14 6 text messages.

15:39:15 7 THE DEFENDANT: I said, "I can't wait until
15:39:17 8 I hold your naked body." And "I can't wait until we
15:39:21 9 have sex." I've read those text messages over and over
15:39:26 10 and over. I read them over and over. I've been going
15:39:29 11 through them every night. Not one text message talks
15:39:33 12 about us having sex, not one.

15:39:37 13 THE COURT: You don't think "holding your
15:39:39 14 naked body" is talking about having sex?

15:39:42 15 THE DEFENDANT: That is talking about having
15:39:44 16 sex, but that doesn't mean we've had sex.

15:39:47 17 THE COURT: So you're denying that you used
15:39:51 18 the text messages to try and persuade, induce, entice or
15:39:56 19 coerce her to engage in sexual activity.

15:39:58 20 THE DEFENDANT: No. I did entice her and
15:40:01 21 was coercing her to having sex, to have it in the
15:40:05 22 future. That doesn't mean I was having sex with her.
15:40:08 23 No. In the future, when we were 18 -- when she was 18.
15:40:12 24 That was the game plan.

15:40:13 25 THE COURT: But she was 15 at the time.

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15:40:15 2 THE DEFENDANT: At the time, she just turned
15:40:18 3 15. Actually, that text message, she was 16 at that
15:40:23 4 time when we -- when we started to talk about the sex is
15:40:27 5 when she was 16.

15:40:28 6 THE COURT: How do we get around the element
15:40:30 7 that he could have been charged with a criminal offense
15:40:33 8 for engaging in sexual activity. I know that he doesn't
15:40:37 9 have to have engaged in sex, but he has to have intended
15:40:41 10 to entice her to engage in sex at the time he is engaged
15:40:46 11 in the communications.

15:40:47 12 MS. MARANGOLA: Of course, Judge. And the
15:40:48 13 communications, I regret not having brought the Facebook
15:40:52 14 messages down here. There are messages that he says
15:40:55 15 "FU, the sex wasn't worth it."

15:41:00 16 THE COURT: Wait a minute, let Ms. Marangola
15:41:02 17 speak.

15:41:03 18 MS. MARANGOLA: So the government's theory,
15:41:04 19 based on the evidence I presented to the jury, is he did
15:41:06 20 have sex with her. He consistently had sex with her.

15:41:10 21 THE COURT: And that is what she claims as
15:41:13 22 well?

15:41:13 23 MS. MARANGOLA: Yes.

15:41:13 24 THE COURT: And it lasted for over a year?

15:41:15 25 MS. MARANGOLA: Yes. Right before she

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15:41:17 2 turned 15, it started when she was 14 and went until she
15:41:21 3 was 16. And the messages on her phone were uncovered by
15:41:27 4 family members and law enforcement was called. That is
15:41:30 5 how the case came to light. The government's theory, he
15:41:33 6 wasn't telling her to wait until they were 18. He was
15:41:36 7 communicating with her over Facebook, text messages,
15:41:40 8 SnapChat, all of the above. And they were discussing
15:41:43 9 having sex tomorrow during school. It wasn't to wait
15:41:48 10 when they were 18. That would not be a crime. So what
15:41:52 11 he is colloquying to, at this point, it's the
15:41:55 12 government's position that is not criminal conduct for
15:41:58 13 which he could be guilty to Count 1.

15:42:01 14 THE COURT: It doesn't seem like there is a
15:42:06 15 plea to Count 1. I assume you want to go forward with
15:42:09 16 Count 2 and 3, so that won't make sense.

15:42:12 17 I'm not going to accept your plea. We're
15:42:14 18 not going to go forward, Mr. McGrain. We'll have a jury
15:42:17 19 decide as to whether or not you're in fact guilty as
15:42:20 20 charged in the indictment and we'll see how that gets
15:42:25 21 resolved.

15:42:26 22 We have a status conference set for next
15:42:29 23 Friday. I know, Ms. Marangola and Mr. Ciccone,
15:42:32 24 indicated in by and large you're fine with the form of
15:42:36 25 the questionnaire that Judge Geraci usually uses. I

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15:42:40 2 want to take another look at it and see if there is
15:42:43 3 anything should be altered because of this case or the
15:42:46 4 nature of the case, and I'll circulate that to everybody
15:42:49 5 before next Wednesday and we'll talk more specifically
15:42:52 6 about the jury selection, really, next Wednesday, just
15:42:55 7 what my thoughts are in terms of how we'll handle that
15:42:58 8 and give them the precautions that we have to utilize.

15:43:03 9 MS. MARANGOLA: Yes.

15:43:04 10 THE COURT: Anything else, Mr. Ciccone?

15:43:05 11 MR. CICCONE: No, Judge. Thank you.

15:43:06 12 THE COURT: Ms. Marangola?

15:43:07 13 MS. MARANGOLA: No, Judge. Thank you.

15:43:08 14 THE COURT: Have a good afternoon,
15:43:10 15 everybody.

15:43:11 16 MR. CICCONE: Thank you, your Honor.

15:43:12 17 THE DEFENDANT: Thank you.

18 * * *

19 CERTIFICATE OF REPORTER

20
21 I certify that the foregoing is a correct transcript
22 of the record of proceedings in the above-entitled
23 matter.

24 S/ Karen J. Clark, RPR

25 Official Court Reporter

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